

# **Ice Clauses in charterparties and insurance cover for damages caused by ice**

**Legal review in the context of arctic shipping**



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# **1. Introduction**

## **1.1. The aims of the thesis**

The aim of this thesis is to examine the legal issues related to the risks caused by ice to a vessel and her performance. These risks will most often materialize in long delays, deviation and heavy hull damage to the ship. In this respect, it is essential to see what are the legal issues and how is the liability allocated between the shipowner and the charterer, as well as who are the other parties directly affected by such risks and these parties' rights. Further problems are related to the insurance coverage and the legal relationship between the shipowner and the insurer and also between the charterer and his insurers.

Those having an interest in the operation of the ship are typically the shipowner, the charterer and the cargo owners. Vessels that operate in cold climate may experience hull damage, propulsion failure due to drifting aground or stranding in ice. Moreover, ships which use the same channel or convoy may collide. Large lumps of ice beneath the water surface may tear the hull, the ship may sink and the cargo can get scattered. In turn, some of these damages can cause an oil spill. Furthermore, a typical situation in winter time is the inaccessibility of some ports where ice conditions vary dramatically and which cause a vessel to be forced to wait or be trapped for several days. This consequently creates unwanted delays and significant financial losses for the parties involved.

The thesis will analyse the disputes which arise between the contractual parties or other injured parties in connection with the operation of the ship when such ice risks materialises. The legal basis for eventual claims can be found in the underlying contract as a result of a breach, in statutory law or depending on the circumstances it can be based on tort law. With regard to the contractual relationship, in the discussion throughout the chapters of the thesis, reference will only be made to the voyage and time charters principles while other types of contract of affreightment, namely the charter party for consecutive voyages, quantity contracts or the bareboat charter party

will not be discussed. This is because the first two are very closely related to voyage charters while the bareboat charter party is significantly different in that the object of this type of contract is not transportation services performed by the shipowner. It is the charterer himself who undertakes all the typical responsibilities of the owner, therefore, the legal issues discussed in this thesis will not arise in bareboat charterparties.

Following the presentation of the legal claims and legal issues in chapters 3, 4, 5 and 6 of this thesis, chapters 7, 8, 9 and 10 examine the insurance cover available for the potential liability and the way these risks are distributed between the insurers and the contractual parties.

The problems discussed in this thesis have a greater significance seen in the context of a more open Arctic Ocean which represents a considerable potential for increased shipping in and throughout the region.<sup>1</sup> However, the opening of the Northern Sea Route (NSR) and the changing Arctic, besides bringing tremendous opportunities, also poses immense challenges. Extreme cold environments are perhaps the most demanding and challenging for both the crew and the vessel. At present, most trans-Arctic voyages take place in summer along the Northwest Passage and the NSR is used mostly for science and tourism purposes. In addition, it has been shown that the Northern Sea Route is the shortest route, connecting Europe with East Asia via the seas of the Arctic Ocean. As compared with the route via the Suez Canal, the NSR makes it possible to transport cargoes from Europe to the Far East. Transportation time is reduced by nearly 40 per cent. Besides, as opposed to the Gulf of Aden, piracy cases have not been registered in the regions beyond the Polar Circle, which makes the NSR very attractive for navigation.<sup>2</sup> The main obstacle for ships is ice. However, modern ice-breaker equipment makes it possible to resolve this problem.

The interest for using these routes for commercial shipping is considerable and therefore, this topic must be seen in the light of new opportunities and challenges of Arctic shipping.

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<sup>1</sup> High north: high stakes (2008) p. 7

<sup>2</sup> Felix H. Tschudi, New frontiers: The Northern Sea Route,  
<http://www.cefor.no/archive/Documents/Felix%20Tschudi.pdf>

## 1.2. Legal sources

The legal sources used in this thesis will be presented throughout the subchapters of the thesis. The main legal system discussed is the Norwegian legal system. Norway is a civil law country based on the Scandinavian civil law system and the main source of law is the statute. Support can, however, be drawn from court cases, academic opinion and customary law.

In the Norwegian context, the Maritime Code of June 1994 no.39 with the later amendments of Act. 26 March 2010 no.10 is the most important source when maritime legal conflicts need to be solved. The Norwegian Maritime Code covers a large number of topics such as inter alia the relation between the charterer and the shipowner and between the shipper, the carrier and the consignee respectively.

In the matter of contract law, the parties can decide among themselves the nature of their relationship and only when the contract is silent is it proper to consult statutory provisions, which are therefore subsidiary. In this area, a significant number of standard charter party forms and clauses have been developed by different players in the trade. For example, BIMPCO<sup>3</sup> is the world's principle organisation responsible for the development of standard forms of contracts and free-standing clauses for the shipping industry.<sup>4</sup> BIMCO has drafted clauses for charterparties covering a wide range of issues, among others, the ice clauses setting out the obligation of the parties in the event of potential ice on voyage. These types of clauses can also be modified mutually by the parties according to their specific needs and in case of dispute the solution must be seen first in the contractual provisions, applying customary interpretation principles.

In addition, it should be noted that English law has had an impact on Norwegian legal provisions and viewpoints<sup>5</sup>. Therefore, English case law is a relevant consideration when resolving issues which are subject to Norwegian law. Thus, in addition to the Norwegian legal system, I will discuss relevant English case law and where necessary, I will present the solutions under both legal systems.

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<sup>3</sup> The Baltic and International Maritime Conference

<sup>4</sup> Legal issues relating to time charterparties (2008) p.1

<sup>5</sup> Falkanger (2011) p. 366

## **2. Some features of voyage and time charterparties**

In the context of both voyage and time charters, there are an extensive number of standard charter party forms, i.e. GENCON, BALTIME, NYPE, SHELVY. The shipowner and the charterer may bring subsequent modifications to a standard text by using rider clauses. Under a voyage charter, the shipowner will bear the risk of delay arising from causes beyond the control of the parties, i.e. when the ship is stopped by a large ice floe. The voyage is usually carried out between ports specified in the charter party and nominated by the charterer. Thus the voyage charterer determines which loading place or berth will be used, and this is relevant for issues concerning liability for damages to the ship. If the charterer nominates a port of loading and the vessel is damaged in connection with its call at that port e.g. because the port is ice bound and makes the passage difficult, the charterer's nomination of that port should be considered the cause of the damage. This would be sufficient to hold the charterer liable.

Under a time charter the vessel is usually fixed for a stated period of time between certain geographical areas. As opposed to a voyage charter, there is a clear division of operational responsibility between the shipowner and charterer in that the charterer's control over the vessel is significantly increased.<sup>6</sup> This control is also extended over the master of the vessel who will have to perform the voyage in accordance with the charterer's wishes. Various time charter party forms establish the limit within which the charterer can utilise the ship. Damage to the ship may be more likely in ice covered waters and this usually results in off-hire. The shipowner remains the bearer of risks connected with the operation of the ship. Consequently, a delay caused by the breakdown of machinery will automatically suspend the contract and hire will not be payable for such period. However, in a time charter, risk of delays caused by factors such as bad weather conditions, ice or port congestion, falls on the charterer who must pay a flat rate for the time he hires the vessel.

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<sup>6</sup> Braden, Vandevender, 49 Tul.L. Rev. p.806 1974-1975, p.806



### **3. Claims by the owner for physical damages to the ship caused by ice**

#### **3.1. Legal basis for the claim**

In principle, in the event of a breach of a contract, the injured innocent party has the remedy to make a claim for damages and usually this is the only remedy available.<sup>7</sup>

More specifically, the shipowner is entitled to make a claim for physical damages to the ship when he can prove that the damage was caused by the charterer's breach of specific provisions in the contract. Thus, the claim will have its legal basis in the contract.

Under Norwegian law the traditional approach is that the liability for damages is triggered by negligence.<sup>8</sup> Consequently, the shipowner, when claiming for damages will have to demonstrate that the loss was caused by the charterer's failure to perform the contract properly.

Circumstances under which the shipowner has a claim for damages caused by ice can be the nomination of an unsafe port and the breaking of the trading limits specific to time charterparties. The consequences of breaking such contractual provisions may result in physical damage to the ship. However, in order to have a valid claim, the shipowner will have to demonstrate or prove the liability of the charterer. The loss incurred by the owners as a result of physical damage to the ship consists normally of costs of repairs and the loss of income for such detention.<sup>9</sup>

Usually, according to most charter-party provisions, it is the shipowner who effects and pays for the insurance of his ship. This means that in case of damage the shipowner will claim the compensation from his insurers. It is also usual in practice that the charterer appears as co-insured in the policy and will therefore take the benefit of the shipowner's insurance cover. Thus, in case of damage, both the shipowner and the charterer will have the right to sue the insurer or the insurance company. It may also happen that in certain circumstances the charterer has the obligation under the charter-party to pay for the costs of insuring the ship. Nevertheless, none of these

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<sup>7</sup> Voyage Charters (2007) p 578

<sup>8</sup> Falkanger (2011) p. 173

<sup>9</sup> Voyage Charters (2007) p. 611

situations imply that the shipowner cannot make a claim directly against the charterers or their servants.<sup>10</sup>

The legal issues between the shipowner and the charterer will be analysed in detail in the following subchapter.

### **3.1.1. Legal issues in connection with the responsibility for navigational control of the ship and the charterer's orders**

The provisions regarding navigational control or employment of ships are typically expressed in charter party forms or standard agreements and are agreed mutually by the parties. This is due to the freedom of contract, which the parties may utilise to a great extent. In case of dispute, or when the parties have diverging views upon how a clause shall be interpreted, the rule corresponding to the Norwegian contract law is that the courts will first look at the intention of the parties at the time the contract was concluded. Thus, the courts will interpret the contract using the ordinary rules of interpretation and by taking into account supplementary law. As example, Baltime clause 9 states: *“The Master to prosecute all voyages with the utmost despatch and to render customary assistance with the Vessel's Crew. The Master to be under the orders of the Charterers as regards employment, agency, or other arrangements”*. This clause has a statutory parallel in the NMC § 378 and gives the charterer a wide-ranging authority over the ship, which apparently includes both navigational and commercial authority, although, this must be interpreted restrictively.<sup>11</sup> If the navigational control over the ship is the responsibility of the charterer, the charter party changes its features and becomes a bareboat charter.

In addition, when interpreting legal provisions of a contract, Norwegian courts will often follow the decision given by higher courts in previous similar cases. Given the importance of English law in the field of chartering and the considerable number of cases, it is not unusual that Norwegian courts will also take in consideration the solutions given by English judges in relevant cases. In ND 1983.309 NA ARICA the vessel chartered between Norwegian parties, suffered an engine breakdown on a

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<sup>10</sup> Aira Force v. Christie (1892) 9 T.L.R. 104 (C.A.)

<sup>11</sup> Falkanger (2011) p. 431

voyage from the US East Coast to Japan. The question was whether hire was payable for the period the ship was under tow across the Pacific. It was concluded by the majority that the charter party's off-hire clause must be read literally and interpreted under English law, therefore, the charterer did not have to pay the hire for the period the ship was not in order.<sup>12</sup>

Typically in time and voyage charters, the navigational instructions are under the shipowner's control, while the vessel's employment is put under the orders of the charterer. There are, however, important differences between the voyage and time charterparties in connection with the employment of the ship. In voyage charters, the shipowner agrees to present his vessel at a nominated port by the charterer and to deliver the cargo at a nominated destination in exchange for freight. This means that the shipowner has the exclusive control over the performance of the voyage and therefore the risks and costs are born by the shipowner. In a time charter party, as opposed to a voyage charter, the control over the vessel by the charterer is significantly increased.

The time charterer has the right to employ the vessel in any way he wishes, subject only to any contractual limitations. In addition, he may also order the master of the vessel – who as a principle operates the ship as a representative of the shipowner - to perform the voyage in accordance with the charterer's wishes. Such division of operational responsibilities have typically consequences upon the allocation of risks between the parties. In practice, in most charterparties such as the New York Produce standard form, the navigational duties are granted to the master who must accordingly obey the charterer's orders but who is at the same time the representative of the shipowner: “...*The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; ...*”.

According to Lord Wright, in *Larringa S.S. Co. v. The King*<sup>13</sup>, “Employment means employment of the ship to carry out the purposes for which the charterers wish to use her” this excluding however how the charterer's instructions are to be executed

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<sup>12</sup> Falkanger (2011) p.445

<sup>13</sup> *Larringa S.S. Co. v. The King* [1945] A.C. p.246 (H.L.)

in terms of navigation.<sup>14</sup> The navigational management will always remain the responsibility of the owners through the master.

Generally, if the master encounters bad weather he can alter the initial course in order to avoid such weather conditions. This decision is consequently a matter of navigation. Moreover this could mean that the master also has the power to decide to change the route in advance of encountering bad weather conditions. According to the House of Lord<sup>15</sup>, however, decisions regarding the route are not matters of navigation, and such deviations from the ordered route, can only be justified on safety grounds. Thus, orders given by the charterer in connection with the choice of the route must be obeyed by the master. However, some contractual provisions such as unsafe ports and trading limits, which are also closely related to situations where ice is impeding the vessel to proceed, may restrict the master's duty to obey. A particular situation in which the master is not only entitled but rather obliged to refuse the orders of the charterers is where the safety of his ship or her cargo are endangered. As Lord Hobhouse said in *The Hill Harmony*<sup>16</sup> "*The master remains responsible for the safety of the vessel, her crew and cargo*".

Another situation where the master is not obliged to obey the charterer's orders is related to the Trading limits provisions according to which the shipowner restricts the charterer's freedom to employ the vessel outside the agreed trading limits. The parties may however, agree otherwise and usually this is made in return for the payment by the charterers of the additional insurance premium required by the vessel's underwriters.<sup>17</sup>

In the context of ice risks and in addition to the above charter party regimes designed to restrict the vessel's trading activity to safe ports and within Institute Warranty Limits, some standard charter-party forms contain clauses that, despite the different wordings, all restrict a charterer's right to order a vessel to (or remain in) icebound ports or areas and otherwise to force ice and give the shipowner the right to leave a port on account of the presence of ice. Scrutton LJ said in *The Inishboffin*<sup>18</sup> that

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<sup>14</sup> *Ibis*, p. 260

<sup>15</sup> *The Whistler International v. Kawasaki Kisen Kaisha* [2001] A.C. p. 657-659

<sup>16</sup> *The Whistler International v. Kawasaki Kisen Kaisha* [2001] 1 Lloyd's Rep. 147, p. 160

<sup>17</sup> *Temple S.S. Co. V. V/O Sovfracht*, [1944] 77 Lloyd's Rep. p. 257, 267

<sup>18</sup> *Limerik Steamship Co. Ltd. v. W.H. Stott & Co. Ltd* [1921] 7 LIL Rep 69 (CA), p. 71

the effect of this type of clause that it:

“enables the master to refuse to go to an ice-bound port, and to refuse to face ice met on his voyage, without being guilty of any breach of charter, and without prejudicing his owners’ right to hire when he is waiting for proper orders, or for a sea free ice. She is also allowed to leave a port which is likely to become icebound, but is not obliged to do so; that is my view, it cannot be said that the owners lose their right to hire, because the master elects to stay when he might have escaped”.

This type of clause would also be applicable under Norwegian law. However, it has also to be mentioned that in the Norwegian Marine Insurance Market the trading limits are regulated in the Norwegian Marine Insurance Plan § 3-15 and are based on a tripartite division: ordinary trading limits, excluded trading limits and conditional trading limits. The detailed geographical description of the three categories has been incorporated into the Plan by way of a separate Appendix.

Furthermore, the shipowner or master may as well chose to follow the charterer’s orders even when they or not obliged to do so.<sup>19</sup> This is also the case of *The Kanchenjunga*<sup>20</sup>, a vessel chartered on Exxonvoy form where Clause 21 regarding safe ports stipulated that *“if owing to any war, hostilities,...entry to any such ports of loading...or discharging...of cargo at any such port be considered by the master or owners in his or their discretion dangerous...the charterers shall have the right to order the cargo...to be loaded at any other safe port...”*. In this case, the charterers ordered the vessel to Kharg and despite the owner’s knowledge that this port was unsafe, they complied with the orders. It was emphasised that the shipowners had waived their right to refuse to go to the nominated port and not their additional right to recover damages from the charterers, if they obeyed the orders and their ship was damaged by the unsafety of the port.<sup>21</sup> Consequently, the legal implication is that even when the owners have complied with the charterers’ illegitimate order they do not subsequently wave their rights under the charter party to claim for damages, unless the owners knew the actual facts when they accepted the order.

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<sup>19</sup> See footnote 28, *The Helen Miller* case

<sup>20</sup> *Motor oil Hellas Refineries S.A. v. Shipping Corp. of India* [1990] 1 Lloyd’s Rep. p. 391, 397 (H.L.1989)

<sup>21</sup> *Time charters* (2008) p. 214

In other words, even though the navigational responsibilities belong mainly to the shipowner and his master, the charterer, typically under a time charter party may have the right to order the vessel within the route he wishes. In such case, the shipowner has the possibility to disobey. But even when the shipowner does not do so, and the facts about the route were unknown to him, he may still have a claim against the charterer should any damage occur on such voyage.

### **3.1.2. Legal issues regarding nomination of safe ports and berths**

As mentioned above, ice risk situations may often be encountered in ports. Standard charter party forms provide a freedom for the parties to choose the location of the ports or areas for loading and discharging. A binding fixture cannot come into existence before these choices are made. This is mostly typical for voyage charterparties but provisions regarding safe ports and berths can also be found in time charter forms. Both PRODUCE 1993 and BALTIME 1939, contain an ice-clause, clause 33 respectively clause 15 (b) which are drafted in a similar way, although, BALTIME is somewhat more detailed. What these ice-clauses have in common is that the vessel shall not be obliged to enter in an icebound port or ports where the passage is considered dangerous because of ice.<sup>22</sup>

In principle, the obligation to nominate the port or berth lies with the charterer. Most charterparties state that the ports and berths nominated by the charterers shall be safe. This may refer to factors such as high winds, insufficient or bad condition of quays<sup>23</sup> or in some time of the year, ice. A definition of safety approved by the courts and applicable to both time charters and voyage charters is given by Sellers L.J. in the *Eastern City* where he stated:

*“A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by navigation and seamanship”.*<sup>24</sup>

Under English and American rules there is an expressed warranty of safety from

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<sup>22</sup> Michelet (1997) p. 84

<sup>23</sup> Gorton (1999) p. 223

<sup>24</sup> Voyage charters (2007) p. 119

the charterer side regarding the nomination of the port (or berth).<sup>25</sup> This implies a heavier burden on the charterer and makes him liable for the situations when the port was considered unsafe. In Norway, the charterer is not subject to strict guarantee liability and the general rule is that when the charter party is silent with regard to liability for damage to the ship in connection with a call to a port, the charterer or his representatives will only be liable for such damage if they have been negligent, cf. §328: “*If the voyage charterer has ordered the ship to an unsafe port, the voyage charterer is liable (...), unless the damage is not caused by the personal fault or neglect of the voyage charterer(...)*” and similar for time charters cf. §385 of the NMC. However, the charterer may undertake liability through an express clause. In Norwegian legal literature<sup>26</sup> it has been stated that arbitration tribunals are both for and against the idea of strict guarantee liability and it makes reference to a number of cases such as ND 1959.242 Hilde Torm and ND 1988.308 NA, where the specific construction of the relevant clauses may lead to guarantee liability. In the first case, the vessel Hilde Torm has suffered damage when it ran aground during discharging of coal in Trondheim. The court found that the Baltcon charter party provision concerning “safely always afloat” represented a guaranty and therefore the charterer was found liable for the damage. In the latter case, the crane vessel Uglen has suffered damages while performing lifting tasks at a workshop. The arbitrators found that the wording in the contract resulted in a special guarantee imposed on the charterers for damages to the ship: “§ 3.0. *Place of operation: The place of operation must be safe, with sufficient water depths and always guaranteeing the crane to be afloat with no risk for damage to the craft and its propellers (...)* § 20.1. *The CHARTERERS shall be responsible for loss or damage caused by the CRAFT or to UGLAND: 20.1.1. by any improper or negligent act or omission on their part or that of their servants or agents(...)*”. On the other hand, in the ND 1962.143 NV Vigrd case the charter party included a provision stating that the vessel shall lie “safely, always afloat” and the shipowner argued that this represented a guaranty against damage caused by grounding. However, in this case, the arbitrators concluded that it is unnecessary to

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<sup>25</sup> See the standard charter forms clause 9 of Asbatankvoy

<sup>26</sup> Gram (1977) p.57

determine the warranty question, because if the place of discharge is suitable according with the provision, the clause does not represent a guaranty that the ship will not be damaged during the discharge.

Thus, the charterer's nomination of an unsafe port or berth may lead to physical damage to the ship, sometimes accompanied by detention and by loss of profit under the charter party.<sup>27</sup> As already mentioned in subchapter 3.1., when the risk materialises and the ship is damaged, the shipowner can bring a claim against the charterer based on the breach of the safety port warranty in the specific charter party. The question whether in the absence of an express warranty, any warranty should be implied, is summarized by Morris L.J. in *The Stork*<sup>28</sup> namely that the implication of a warranty of safety is automatic.<sup>29</sup>

The shipowner, however, cannot refrain from investigating the safety of the port and he can make a reservation concerning the charterer's nomination of a port. Therefore, it can be argued that when the shipowner had the knowledge about the condition of the port after the charterer's nomination, the damage is a consequence of the owners' (through the master) failure to act prudently. In *Limerik V. Stott*<sup>30</sup> the ship encountered thick ice on the route to Abo, when she was about 200 miles from the port. The master decided to force the ice instead of waiting for the icebreaker assistance. Consequently, the ship became stuck and sustained damages. It was said in this case that the ship could have reached her port of destination, Abo, safely, had the master waited for the icebreaker. However, if because of ice en route, the port of destination cannot be reached safely, the charterers may be liable for the damages to the ship on the ground that the port is unsafe.<sup>31</sup>

Another case<sup>32</sup> that confirms the charterer's responsibility for damages sustained by reason of ice if the port or the approach to the port where damage occurs is found to be unsafe by reason of ice is *The MV Sussex Oak*. In her approach to Hamburg, the vessel was stopped by a large ice floe and she could neither turn, go astern nor anchor

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<sup>27</sup> Voyage charters (2007) p. 616

<sup>28</sup> *Compania naviera Maropan v. Bowaters Lloyd* (1955) Q.B. 68, p. 105

<sup>29</sup> Voyage charters (2007) p.112

<sup>30</sup> *Limerik Steamship Co. Ltd. v. W.H. Stott & Co. Ltd* [1921] 2 K.B. 613, 15 Asp. M.C. 323

<sup>31</sup> Time charters (2008) p. 665

<sup>32</sup> *G.W.Grace&Co v. General Steam Navigation Co.* [1949-50], 83 L1.L. Rep. 297



in safety. The master decided to force ice sustaining damage in consequence. Devlin, J. held that: *“The charterer does not guarantee that the most direct route or any particular route is safe, but the voyage he orders must be one which an ordinary prudent and skilful master can find a way of making in safety”*. Thus, the charterer was held liable for the damage on the ground that Hamburg was an unsafe port.

### **3.1.3. Legal issues regarding the charterer’s liability under trading limits provisions**

The charterer is in breach of the contract when he directs the employment of the ship outside the trading limits as established within the specific agreement. It must be said that this situation is particular only to the time charters. The voyage charter party defines the geographical employment of the ship while in time charters, the charterer has the freedom to send the ship in any navigable waters around the world within the trading limits.

The seasonally excluded areas which cannot be navigated during winter season are typically the St. Lawrence Seaway, Northwest coast of North America, Northwestern Russia and the Baltic. The reason is the ice and the ships which, even if fitted to navigate in such hazardous waters, may encounter severe damages. These areas are considered outside trading limits for which the shipowner needs to get permission from the underwriters or pay extra insurance premiums, depending on the contractual stipulation.

It is of importance to say that the ‘intra-Arctic’ shipping comprises today summer operations in the Canadian Arctic, around Greenland and year round operations along port of the NSR.<sup>33</sup> In these areas, even though the operations take place throughout the summer this does not exclude the presence of ice and icebergs. Some of these areas are today outside of the trading limits as they are established by the English Hull Conditions (ITC) in England or the Institute Warranty Limits or in the Norwegian Marine Insurance Plan, cf. § 3-15.

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<sup>33</sup> Legal aspects of Arctic shipping, 2010, p. 5  
[http://ec.europa.eu/maritimeaffairs/pdf/legal\\_aspects\\_arctic\\_shipping\\_summary\\_en.pdf](http://ec.europa.eu/maritimeaffairs/pdf/legal_aspects_arctic_shipping_summary_en.pdf)

The general provisions of the Norwegian Maritime Code regarding the charterer's disposal of the ship cf. § 378 gives the owner the option to decide upon the performance of the voyage in special cases:

“The time carrier shall, however, not be obliged to perform a voyage which exposes the ship, persons on board or the cargo to danger in consequence of war, warlike conditions, ice or other danger or significant inconvenience which the time carrier could not reasonably have foreseen at the time when the contract was concluded”.

Similar provisions may be found in specific charterparties such as the Gentime in clause 2, referring to the Trading areas whereby:

“The vessel shall not be required to enter or remain in any ice bound port or area, nor any port or area where lights, lightships, markers or buoys have been or are about to be withdrawn by reason of ice, nor where on account of ice there is risk that, in the ordinary course of events, the Vessel will not be able safely to enter and remain in the port or area or to depart after completion of loading or discharging. The Vessel shall not be obliged to force ice but subject to the Owner's prior approval, may follow ice-breakers when reasonably require, with due regard to her size, construction and class. If, on account of ice, the Master considers it dangerous to remain at the port or place of loading or discharging for fear of the Vessel being frozen in and/or damaged he shall be at liberty to sail to any convenient place and there await the Charterers' new instructions”.

It may often happen that the time charterer wishes to direct the vessel to ports or places outside the limits of the charter-party. When this happens without the owner's consent and consequently the vessel is being damaged, the shipowner has the right to hold the charterer liable for damages due to breach of contract. However, the shipowner may accept the charterer's request to proceed outside the trading limits but the owner will be free to demand any conditions such as for example to require the charterer to be liable for all damages to the ship occurring when the ship is outside the area agreed in the charter party.

There may also be situations when the shipowner through his master has failed to protest against the charterer's order to proceed to areas outside the trading limits. Nonetheless, this did not result in the owner's liability. It is the case of the Temple

Steamship V. Sovfracht<sup>34</sup>, where the vessel Temple Moat was chartered on an amended Baltime (1920) form. In this case, the obedience of the master to the charterer's orders did not prejudice the owners' claim for damages, as he was (according with Clause 8), under the orders of the charterers as regards employment. In other words, waiver of the right to refuse to comply with an order does not involve waiver of the right to damages if loss should occur.<sup>35</sup>

The shipowner may as well agree with the charterer's orders to employ the vessel outside the trading limits. This will be possible against the payment of extra insurance premium by the charterer based on a special clause in the charter-party. An example of such additional clause is the New York Produce form charter for The Helen Miller<sup>36</sup> which defines the trading limits as being "*between safe ports within Institute Warranty Limits including St. Lawrence up to and including Montreal, but excluding Cuba (...), and all safe unsafe ports, but Charterers have the liberty of braking limits, they paying extra insurance, if any (...)*". In this case, the charterers ordered the ship to ports outside the Institute Warranty Limits and she suffered ice damage on voyages to ports, which were found to have been unsafe at the relevant time. Consequently, the charterer was held liable for the breach of sending the vessel to unsafe ports. In the Helen Miller case Mustil, J. held that "*by paying the premium the charterer does obtain a benefit – the benefit of being able to send the ship on a voyage which the owner would not otherwise allow her to perform. But this is not at all the same as saying that the charterer thereby obtains the right to send her on such a voyage risk-free*".

It must be noted that even though damage to the ship caused by ice is dealt with such clauses as safe ports and trading limits, this does not mean that these clauses are contradictory to the ice clause. In an arbitration award<sup>37</sup>, it was held that the owner's acknowledgment that a port is safe and suitable for the vessel does not deprive the master or the owner of their rights under the ice clause in the event that a port becomes inaccessible by reason of ice.<sup>38</sup> The vessel, in this particular case was chartered on

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<sup>34</sup> Temple Steamship Co. Ltd. v. V/O Sovfracht [1945] 79, L1.LRep. 1

<sup>35</sup> Time charters (2008) p. 136

<sup>36</sup> The Helen Miller, (1980) 2 Lloyd's Rep. 95

<sup>37</sup> London arbitration 12/00, L.M.L.N. 546

<sup>38</sup> Voyage charters (2007) p.713

Synacomex form and was heading to Mariupol, a port acknowledged by the owners as being safe and suitable for the vessel. The charter party also incorporated the Gencon General Ice Clause which provided that if the port of loading was inaccessible by reason of ice, the Captain for fear of being frozen in has the liberty to leave without cargo and the charter shall be cancelled. On December 2 the owner declared Mariupol ice bound and the master consequently sailed to Ilychevsk. The tribunal found that by doing so the master has exercised his rights under the ice clause and subsequently would have been entitled to treat the charter party as null and void. However, the owner has never definitely claimed the protection of the clause, and because both parties accepted that the charter party was frustrated without agreeing upon other terms, the tribunal found that neither party had a claim against each other.

### **3.2. Concluding remarks**

As mentioned above, in Norway, the general rule is that when the charter party is silent with regard to liability for damages to the ship, the charterer or his representatives will only be liable for such damages if they have been negligent, cf. § 328 and § 385 of the NMC. This is opposed to English common law rules where the charterer has an express warranty for nomination of safety ports. The charterer may, however, undertake strict liability under an express clause. Thus, the legal basis for the shipowner's claim lies in the charter party or alternatively in the provisions of the statute.

The liability of the charterer is triggered when damages to the ship occur due to ice risk situations by breaching the ice-clause provisions, i.e. as a consequence of nominating an unsafe port, and typically when the time charterer has breached the specific agreement by ordering the ship outside the trading limits. To avoid liability in such cases the charterer will have to demonstrate that the damages were in fact caused by fault of the shipowner due to navigational errors. As described above, the risks connected to the operation of the ship are in principle beard by the shipowner.

However, the analysis of an eventual dispute must be made on a case by case basis. This is due to the actual facts which may influence the final solution. The shipowner cannot refrain from investigating the safety of a port and must make reservation con-

cerning the charterer's nomination of a port. In addition, a shipowner having acknowledged the time charterer's breach of ordering the vessel outside the trading limits as established in the agreement, will be held liable for failure to act prudently. In such situation the liability will be apportioned according to the degree of fault for which the two parties are being held responsible.

## 4. Claims by the charterer for delays to the ship caused by ice

### 4.1. Legal basis for the claim

Relevant provisions regarding the performance of the voyage and delays are usually expressly stated in the individual charterparties, i.e. the shipowner generally promises that the vessel shall proceed with all convenient speed<sup>39</sup> or with the utmost despatch<sup>40</sup>. In Norway, however, when the contract is silent in this regard, the supplementary provisions in statute, i.e. the NMC will be applicable. Similarly, according to English law the shipowner and the charterer are free to vary the terms of their contract by inclusion or exclusion of provisions but the obligation of the parties to a charter goes beyond those specified in writing. In addition to the express undertakings, every charter party gives rise to certain implied undertakings such as: the shipowner's implied duty to proceed with reasonable (utmost) despatch or that the ship will proceed without unjustifiable deviation.<sup>41</sup> Whether expressed or implied, a breach of any charter party provision entitles the other party to a remedy which may be either to cancel the charter party or sue for damages.<sup>42</sup> As regards deviation, in a Norwegian case law ND 1914.470 NSC SKARP where the vessel, during a wrongful deviation, took sea water and the cargo was damaged, the Supreme Court concluded: *"The consequence of this contractual breach by the owner must, in my view, be limited to damages arising during the deviation. But the owner will also have the burden of proof for establishing that the damage discovered at the end of the voyage did not occur during the deviation or at least that the damage would have occurred even if the original course had been maintained"*. In this case, the owner could not demonstrate that the damage discovered at the end of the voyage did not occur during the deviation or that the damage would have occurred even if the original course had been maintained. Thus, the Supreme Court concluded that the shipowner was liable for

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<sup>39</sup> Norgrain 1989, Line 12: "Loading port(s) 1. That the said vessel, being tight, staunch strong and in every way fit for the voyage, shall with all convenient speed proceed to (...)"

<sup>40</sup> New York Produce Exchange 93 clause 8 (a): "The master shall perform the voyage with due despatch, and shall render all customary assistance with the Vessel's crew (...)"

<sup>41</sup> Braden Vandevender, 49 Tul.L. Rev. p.806 1974-1975

<sup>42</sup> Ibis

damages caused during the deviation.

Provisions regarding delays differ considerably in voyage and time charters therefore the discussion regarding charterer's right to make a claim for delays against the shipowner will be discussed separately.

With respect to voyage charterparties, it is provided in the Norwegian Maritime Code that the voyage carrier – shipowner – shall perform the voyage with due despatch, cf. § 339. Delays may usually occur during the actual voyage before the arrival of the vessel at the loading port and after arrival at the loading and discharging port. At the stage of the preliminary voyage, the shipowner generally promises that the vessel will proceed with all reasonable despatch to the port of loading in order to arrive on an expected date. The meaning of “due despatch” will depend on the facts of the particular case, the essence of this requirement is that the choice of route should be reasonable and the performance of the actual voyage should take place with reasonable speed.<sup>43</sup> Sometimes the shipowner may find it necessary to change the intended route which will consequently result in delays or even physical damage to the ship. For as long as such deviation is legitimate, there is no breach by the shipowner. According to NMC § 340, deviation for reasonable grounds is permitted.

When delays or deviation is caused by ice, the solution for the charterer's claim may have a different outcome. Therefore the legal issue regarding the allocation of risks caused by ice will be discussed in detail in the following subchapter.

Generally, the provisions regarding loading and discharging are of particular importance for both parties of the contract because of its direct effect on the timing of the commercial activity. While the charterer is interested in a reasonably prompt delivery, the shipowner wants to complete each charter as quickly as possible. It is therefore necessary to allocate risk between the owner and the charterer. The main obligation of the shipowner under such provision in the individual contract is that the vessel must have arrived at the loading port. A certain period of time, so-called “laytime”, is set aside for loading, and if loading is completed within this time, no additional payment is due from the charterer. Consequently, if the vessel has not yet

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<sup>43</sup> Falkanger (2011) p. 381

arrived, the laytime does not commence and the risk of delay is born by the shipowner.

With regard to time charters, the consequence of a vessel being damaged or hindered to perform the services required<sup>44</sup>, is that the charterer is not liable for hire, i.e. the charterer has the right to claim off-hire when delay is attributable to the named causes in the charter party. Whether loss of time is due to hindrances on the part of the shipowner is not a question of fault. Thus, there is no need to consider whether the owner or anyone for whom he is responsible can be blamed for what has occurred, and the underlying reason is irrelevant. In Norwegian law, the rules regarding off-hire situations are based on a system of risk allocation, which applies unless otherwise agreed, cf. NMC § 392 first paragraph. However, usually the charter party will contain provisions allocating these risks but when the relevant clause is unclear or incomplete, the rules in NMC § 392, first paragraph may be supplementary.

The particular legal issues arising when ice prevents the vessel to proceed at the loading port or leave the discharge port will be discussed in the following subchapter.

#### **4.2. Legal issues and the risk for delays caused by ice**

Under a voyage charter, when there is a relevant ice-hindrance the shipowner has no responsibility for deviation or delays made necessary or caused by the ice.

As described above, the voyage shall be carried out with due despatch. However, major obstructions, such as ice, which prevent the vessel from proceeding, do not trigger the shipowner's liability if he deviates the ship, even by delay to the extent necessary. Situations where there is danger of freezing in or being stranded in ice or instances where there is fear of damage while forcing the ice, can be considered reasonable reasons for deviation. However, the loss of time is born wholly by the shipowner. This does not immediately imply that the shipowner's obligations under the contract are abrogated or changed. The ice-hindrances are limited, and when they cease to exist, the voyage must be carried out without any claim for additional freight. The freight is stipulated for the voyage, not for the time used, and the risk for delays

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<sup>44</sup> Ibis, p. 417



remains with the owner.<sup>45</sup> Moreover, according to NMC § 349 if, because of any delays it can be concluded that the purpose of the contract is essentially frustrated, the charterer has the right to cancel the chartering agreement.

As opposed to voyage charter, in time charter party the performance of the voyage is under the charterer's obligations. This is provided in Baltime clause 9 which gives the charterer the right to give orders to the ship within the agreed parameters<sup>46</sup>. The charterer is obliged throughout this period to pay hire continuously, except for time which is lost due to "hindrance on part of the owner". The rules concerning off-hire are based on a system of risk allocation, which applies unless otherwise agreed, cf. NMC § 392. Typical situations when the charterer does not pay hire are loss of time due to strike on board, the loading equipment may not work or the main engine breaks down. But when the vessel is traded in waters with icy conditions and the vessel becomes inoperative or delayed because of ice, the charterer is not relieved of his obligation to pay hire. It is after all the charterer who orders the vessel in such waters, hence, it is in principle his obligation to get information about the conditions at sea. He will then be liable if the causation between the actual damage and the consequent delay is satisfied. The reason for establishing the original cause of delay is that if it is found that the actual cause of delay is the machinery break down, the off-hire rules apply and the charterer is relieved from his obligation to pay hire for such period. A typical example is when a vessel's machinery breaks down while trying to get through ice with the consequence that she remains stranded and partly damaged before she is able to sail again with the help of icebreakers. In such case, the cause of delay is the machinery breakdown and not the actual conditions at sea.

The problem of delays caused to the ship as a result of ice risk at the loading port, sea voyage or discharging port are dealt with in the ice clause. The ice clauses can be manifold and of great variation, and their purpose is to establish limits and give several options for the parties. The General Ice Clause for voyage charterparties as drafted by BIMCO has separate rules for the port of loading and the port of discharging.

According to the rules regarding the port of loading, when the vessel is impeded

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<sup>45</sup> Brækhus (1968) p. 256

<sup>46</sup> See 3.1.1.

by ice or if on arrival the loading port is inaccessible by reason of ice, the charterer is required to nominate a safe and accessible alternative port. It has to be noted that the inaccessibility of the port must be of a reasonable duration. If the charterer has given a safe port warranty and the vessel must wait due to inaccessibility of the port, the charterer's warranty of safety will only be broken if the delay is long enough to frustrate the commercial object of the charter party.<sup>47</sup> An example of similar ice clause is found in Asbatankvoy standard form for tanker voyage charters:

“Clause 14 (a) ICE

In case port of loading or discharge should be inaccessible owing to ice, the Vessel shall direct her course according to Master's judgment, notifying by telegraph or radio, if available, the Charterers, shipper or consignee, who is bound to telegraph or radio orders for another port, which is free from ice and where there are facilities for the loading or reception of the cargo in bulk. The whole of the time occupied from the time the Vessel is diverted by reason of the ice until her arrival at an ice-free port of loading or discharge, as the case may be, shall be paid for by the Charterer at the demurrage rate stipulated in Part I.

14 (b)

If on account of ice the Master considers it dangerous to enter or remain at any loading or discharging place for fear of the Vessel being frozen in or damaged, the Master shall communicate by telegraph or radio, if available, with the Charterer, shipper or consignee of the cargo, who shall telegraph or radio him in reply, giving orders to proceed to another port as per Clause 14 (a) where there is no danger of ice and where there are the necessary facilities for the loading or reception of the cargo in bulk, or to remain at the original port at their risk, in either case Charterer to pay for the time that the Vessel may be delayed, at the demurrage rate stipulated in Part I.”

In sub-clause (a), notwithstanding the owner's navigational control in any event, the master is given the discretion to direct the vessel's course in situations where the port is inaccessible owing to ice. Upon the master's notification about the inaccessible port, the charterers have the express obligation to transmit telegraph or send radio orders for an ice-free port. The clause provides that “the whole of the time occupied from the time the vessel is diverted by reason of ice” until her arrival at a substitute ice-free port shall be paid by the charterers at the demurrage rate. The wording “occupied” in this context does not mean time lost or extra time taken.<sup>48</sup> Hence, it can be said that

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<sup>47</sup> Voyage charter (2007) p. 707

<sup>48</sup> Ibis, p. 863

when the port of discharge becomes inaccessible, the owner can claim for full freight and demurrage from the time of her diversion until arrival at the alternative port.<sup>49</sup>

Sub-clause (b) provides that under the master's notification regarding the "fear of the vessel being frozen in or damaged", the charterer has the option to either order the ship to an ice-free port or to remain at the original port. In the latter case, in the event of any risk of damage or delay to the vessel, the charterer is obliged to pay compensation equivalent to the rate of demurrage.

Peculiar to this sub-clause is that the owner is obliged to rely on charterer's ability to indemnify him for damages or delay to ship rather than have the right to refuse to remain at the port.

The second alternative of the charterer in case he does not nominate a safe port, as it follows from the General ice clause, is to reckon laytime as if the port named in the contract were accessible. The usual effect of ice during the laytime is to prevent the provision of cargo. Thus, if the port does not become accessible within the laytime the charterer will have the obligation to pay the owners the rate of demurrage as a consequence for delays to the ship.

A third alternative for the charterers is to cancel the charter party. However, they have rarely an interest to do so<sup>50</sup>. In such case and when the charterer has failed to comply with any of the options he has according to the ice clause, the shipowner has the right to cancel the charter party with the charterer's obligation to pay compensation for all proven loss of earnings under that charter party.

At the port of discharge when for the same reasons of ice impeding the vessel or when the port is inaccessible due to ice, the charterer has again the option to nominate a substitute accessible port or to keep the vessel waiting against the payment of compensation. The compensation is an amount equivalent to the rate of demurrage. In principal, according to the ice clause, if the charterer nominates a substitute port the freight to be received by the shipowner shall be the same as if the discharge had been at the original port of destination. However, when the distance to the substitute port is exceeding 100 nautical miles, the freight that the charterer must pay on the cargo

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<sup>49</sup> Ibis, p. 863

<sup>50</sup> Brækhus (1968) p. 257

delivered will be increased proportionally.

The General ice clause for time charterparties stipulates that any risks of delay or deviation by reason of ice shall be borne by the time charterer. As pointed out above, an off-hire clause relieves the charterer of the obligation to pay hire when delay is attributable to any of the named causes or according to the statute. However, when the charterer breaches his obligation stipulated in the ice clause to not enter or remain in icebound ports or areas, he is liable and the vessel remains on-hire unless the charterer can show that the event causing the detention or delay is within the wording of the off-hire clause.

Clause 14 in the Baltime form comprises an ice clause and stipulates that consequences of detention by ice through any of the causes described shall be for the charterer's account:

“Excluded ports (...) Ice b) any ice-bound place or any place where lights, lightships, marks and buoys are or likely to be withdrawn by reason of ice on the Vessel's arrival or where there is risk that ordinarily the Vessel will not be able on account of ice to reach the place or to get out after having completed loading or discharging. The Vessel not to be obliged to force ice. If on account of ice the Master considers it dangerous to remain at the loading or discharging place for fear of the Vessel being frozen in and/or damaged, he has liberty to sail to a convenient open place and await the Charterer's fresh instructions. Unforeseen detention through any of above causes to be for the Charterer's account”

In addition the ice clause provides that the master is not obliged to force the ice and if he does so, when the charterer has provided icebreaker assistance, he may not hold the charterer responsible for damages sustained by the ship. A port which is accessible even by reason of ice due to the icebreakers assistance cannot, as held in the *Inishboffin*<sup>51</sup> be called an icebound port. However, when it is considered that the port of destination cannot be reached in safety and the master has to force the ice, the charterer may be liable for damage to the ship on the ground that the port is unsafe.<sup>52</sup>

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<sup>51</sup> *Limerik Steamship Co. Ltd. v. W.H. Stott & Co. Ltd* [1921] 7 LIL Rep 69 (CA) Rep. 190 also see footnote 17

<sup>52</sup> See subchapter 3.1.2. and the *MV Sussex Oak* footnote 31

### 4.3. Concluding remarks

During the performance of a voyage charter, as a general principle, stipulated in the contract or statute, the shipowner has the duty to proceed with utmost despatch. An illegitimate deviation or wrongful decision made by the master with the consequence of delays may give the charterer the right to hold the shipowner responsible for losses that may arise.

The situation is, however, different typically in the case of a relevant ice hindrance during the voyage. This is because a major obstruction like ice which prevents the vessel from proceeding, is an exception from the restriction to deviate from the initial route. Such circumstances do not make the shipowner responsible towards the charterer, and the loss of time is wholly on the shipowner's account.

At the loading or discharging port the allocation of risks for delays caused by ice are in principle stipulated in the relevant ice clauses. The main purpose of the ice clause is to protect the owners against the risks of ice being experienced at the approach voyage, and therefore place a great responsibility on the charterer's side. Thus, a charterer will have to pay compensation to the shipowner for the loss of time caused when the vessel is impeded by ice at the loading or discharging port.

In case of time charter party, the master has a great discretion in proceeding to an ice bound port. Nevertheless, any delay or deviation caused by or resulting from ice shall still be on the charterer's account and he shall subsequently continue to pay the hire, cf. the General Ice Clause for time charterparties.<sup>53</sup>

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<sup>53</sup> BIMCO Special circular No. 1, 24 February 2005  
[https://www.bimco.org/~media/Documents/Special\\_Circulars/SC2005\\_02\\_24.ashx](https://www.bimco.org/~media/Documents/Special_Circulars/SC2005_02_24.ashx), accessed on the 27th of Sept 2011

## **5. Claims by the cargo owner against the shipowner**

### **5.1. Legal basis for the claim**

As mentioned earlier, the ice risks may as well affect the interest of the cargo owner. Damages in this case can be either physical damage to the cargo or damages caused by delays.

In connection with the carriage of goods by sea, important regulations on the legal issues regarding damage to cargo transported under bills of lading are the Hague-Visby Rules. The Rules have been incorporated in many countries involved in maritime trade, among others Norway, but they are not compulsory applicable to charterparties unless they are incorporated expressly so as to apply between the shipowner and the charterer.<sup>54</sup>

When the goods have been damaged or delayed the cargo owner who may be a shipper<sup>55</sup>, the sender<sup>56</sup> or the charterer himself, must pursue his rights under the underlying contract – the bill of lading. The person who can be sued under the bill of lading is the shipowner undertaking the transport. Furthermore, a claim can also be brought against the charterer of the vessel. In this case, the legal basis for the claim is laid down in the charter party provisions which contain the same allocation of risk as in the relationship under the bill of lading. In addition, the cargo owner is entitled to claim for damage to cargo on the basis of ordinary tort rules. Under Norwegian law, the carrier's (shipowner's) liability under a charter party for damage, loss and delay of cargo are regulated in the Norwegian Maritime Code cf. § 347 and § 383 which in turn refer to Chapter 13 of the Code. Moreover, these provisions are mandatory in the relationship between the shipowner and the holder of a bill of lading (cargo owner), cf. NMC § 383 second paragraph which refers to § 325 second paragraph second sentence.

An important rule regarding the liability for damage to the cargo under the

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<sup>54</sup> Voyage charters (2007) p. 941

<sup>55</sup> The person who delivers the goods for carriage, cf. § 251 of the NMC

<sup>56</sup> The person who enters into a contract with the carrier (shipowner) for the carriage of general cargo by sea, cf. § 251 of the NMC

Norwegian Maritime Law is the condition of fault or neglect by the shipowner. For the carrier to be liable for loss/damage of goods or delays the shipowner, or someone for whom he is responsible, must have caused the damage through some culpable conduct, cf. § 275 of NMC. It is thereafter the shipowner's burden to prove that the damage was not actually caused due to his fault or neglect. Under English law, the principle is that the carrier is strictly liable for the goods.<sup>57</sup>

As an example, the liability of the shipowner may be triggered by reasons of unseaworthiness of the vessel, cf. § 276 NMC. If the vessel is about to be traded in areas with ice dangers, the shipowners has the duty to comply with regulations for ice-going ships.

## **5.2. Shipowner's liability and defences against the cargo owner's claims**

The shipowner's duties with respect to the cargo are outlined in the provisions of the NMC. According to NMC § 262 the shipowner has the duty to "*take care of the goods and in other respects protect the interests of the owner from the reception and to the delivery of the goods*". This also involves the duty not to deviate from the initial or intended route. Damage or delay to cargo is the most frequent type of liability that confronts a shipowner. The reasons may be various. Damages to the cargo because of direct contact with ice are seldom. Main commercial activities that may increase in the future due to a greater use of the Arctic Ocean are container shipping, oil and gas exploration and tourism. As far as container ships are concerned, possible accidents due to contact with large lumps of ice may cause the cargo to get scattered. However, the most common scenario is that the vessel is delayed and the cargo is damaged because the transport takes too long, e.g. the fruit decays or the goods arrive in good condition but too late. Hence, the value of the goods drops significantly. In any of these cases the relevant factor in establishing the shipowner's liability is his negligence.

With respect to the period during which liability can arise, § 274 stipulates that the shipowner is responsible for the time he has the cargo in his possession at the loading port, during voyage, and at the port of discharge. As a starting point, the claimant, i.e.

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<sup>57</sup> Falkanger (2011) p.270

the cargo owner must show that the damage occurred while in the shipowner's custody and that he has suffered an economic loss. Moreover, NMC § 275 contains the main rule regarding the shipowner's liability and imposes liability for damage, loss or delays which are caused by the fault or neglect of the shipowner or someone for whom he is responsible. Subsequently, in order to avoid liability, the shipowner will have the burden of proving that he and his servants acted reasonably.

An example for which the shipowner may be held liable for damages to the cargo is the initial unseaworthiness of the vessel before the commencement of the voyage. The term seaworthy must be seen in its broad sense, i.e. the ship must be in the condition that allows it to perform the contemplated voyage without endangering human life. The requirements will depend also on the type of voyage (coastal/transatlantic), the type of cargo to be transported and the time of the year. Moreover, the vessel must also be seaworthy in relation to the cargo. More specifically, if a vessel is traded in waters which are known to be dangerous for reason of ice, the shipowner must make sure that the vessel is able to complete and perform the voyage without endangering the goods. Thus, the requirement of reasonable care will not only depend on the particular goods, but also on the type of voyage i.e. for voyages across North Atlantic in midwinter, the demands for precaution are typically more stringent.

However, according to NMC § 276 first paragraph and the Hague Visby Rules in art.4.2.sub-sections a - q there are given situations where the shipowner is exempt from liability. Of interest is sub-section (d) which refers to the exemption from liability in case of loss or damage caused by the Act of God. This concept is similar to the civil law concept of force majeure and it is one of the few common law exceptions to the strict liability of common carriers. The exemption applies in an event external to man due to natural causes, directly and exclusively without human intervention and when the shipowner can show that it could not have been prevented by any amount of foresight or reasonable care. It has been held, that apart from the extraordinary conditions of wind, sea or lightning, frost may amount to "Act of God" (*Siordet v. Hall* (1828) 4 Bing. 607)<sup>58</sup>. Thus, if the cargo is damaged by reason of ice during the voyage and this

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<sup>58</sup> Time charters (2008) p. 504



event can be considered unforeseeable and irresistible<sup>59</sup>, the shipowner may invoke the Hague-Visby Rules provisions, art.4.2. (d).

But when a vessel is traded in waters which are known by the shipowner to be dangerous by reason of ice, and which could be a threat for the safety of the goods with the consequence of damage or delays, the exemption provisions of The Hague Visby Rules cannot be invoked by the shipowner. The same applies when the vessel is called at an icebound port which should have been known to be unsafe and which causes delays or consequent damages to the cargo. Moreover, where a ship encounters ice, and she grounds during navigation in ice, there is no defence of Act of God because of the human act of navigating in such conditions. Nevertheless, the Rules in Article 2 (a) provide a defence for the shipowner whereby, in case of damage or loss of cargo due to negligence in navigation or management of the ship, the shipowner is free of liability. This rule can be found in NMC § 276 which also stipulates in third paragraph that the rule is not applicable for contract of carriage by sea in domestic trade in Norway. However, in a charter relationship between shipowner and charterer, cf. NMC § 347 first paragraph second sentence “*The provisions relating to domestic trade in Norway in section 276 paragraph three (...) do not apply*” and similar cf. § 351 second sentence. Thus, the liability exemptions in section 276 for navigational errors and fire are still available to the shipowner.

### **5.3. Concluding remarks**

When damages or delays to cargo occur during a voyage, the cargo owner has in principle a claim against the shipowner or the charterer based on the underlying bill of lading or respectively the underlying charter party.

The shipowner’s liability for damage to or loss of cargo by reason of ice will mainly depend on the contractual provisions and the allocation of such risks. As it was mentioned, the governing principle is freedom of contract and the allocation of risk varies from one charter party to the next. It is, however, the mandatory rules on cargo damage and delay in Chapter 13 of the Norwegian Maritime Code which prevail. This

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<sup>59</sup> Voyage charters (2007) p 1031

is valid also when a bill of lading has been issued (cf. § 325) and this document determines the legal relationship between the shipowner and the holder of the bill of lading (the cargo owner). Thus, the shipowner is liable for damage or loss to the cargo caused negligently unless he can prove himself innocent. Moreover, when the situations in § 276 are proved, i.e. when the loss is a consequence of neglect or fault in the navigation of the ship, the shipowner is free from liability.

## **6. Third party claims against the shipowner**

The discussion in the previous sub-chapters was based on the existence of a contract between an injured party and the shipowner. This chapter will focus mainly on scenarios that are outside the scope of contractual relations, these including oil pollution and collisions between ships, as well as third parties injury claims. In this context, when oil pollution occur, liability for loss caused thereby is governed in many countries by the Civil Liability Convention 1969 and 1992 which impose on the shipowner strict but limited liability for pollution damage. Under Norwegian rules, liability for oil pollution is regulated in NMC Chapter 10 and the Chapter incorporates the CLC Convention 1992.

As global demand for energy rises there is an increased interest in exploring the oil and gas resources of the Arctic which are estimated to hold in excess of 100 billion tonnes of oil equivalent.<sup>60</sup> This also means an increase in the number of ships that will navigate these ice-bound waters in the years ahead, therefore, provisions regarding ice at loading ports may become more important. From the various types of tanker charterparties designed for transporting any type of liquid cargo we can name Shellvoy 5 and Shelltime 4. The former incorporates an ice clause (clause 22) which addresses mainly the position of the parties when no cargo has been loaded if ice danger arises, when cargo has been loaded, and finally, if the problem arises at a discharging port. The latter, under clause 4 treats the navigation in ice briefly. It is stipulated under Lines 69-72 that the charterer may order the ship to icebound ports “or to any part of the world” outside Institute Warranty Limits, provided the shipowner’s consent and the charterer’s duty to pay any additional insurance premium. Oil pollution is not, however, treated by these clauses.

When damage caused by oil pollution occurs, any party affected thereby can make a claim against the shipowner. This liability is regulated cf. § 183, § 191 and § 193 of the NMC. Regarding the shipowners liability for such damages and insurance cover, see chapter 9.

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<sup>60</sup> Corkhill, (2011) [https://www.bimco.org/Home/News/2011/09/14\\_Feature\\_Week\\_37.aspx](https://www.bimco.org/Home/News/2011/09/14_Feature_Week_37.aspx)

Third party claims may also result from collisions between two ships, situation in which an injured party who suffered a loss may claim damages against the negligent ship. The traditional approach under Norwegian law is that both negligence and causation must be present. This means that a shipowner must have acted with negligence and this faulty behaviour has consequently led to damage or loss for a third injured party. Anyone acting in a culpable manner, whether through an act or an omission, so as to cause damage to a third party, is liable for the damage. Such liability is based on a non-contractual relation i.e. liability in tort.

To exemplify, we can assume two passenger ferries which, because of heavy winds and thick ice cover along the coastline, have been pressed together with the result of major damage to both ships and some injured persons on one of the ships. Further it can be assumed that the collision could have been avoided if one of the ships had respected the ice condition warnings and waited for the ice breakers to help the vessel get through the ice. In this context, the injured parties on the innocent ship have the right to claim for damages against the vessel at fault, based on the NMC § 161 first paragraph. To avoid liability, the shipowner has the burden of proving that no fault or neglect has occurred. This results from section 421 second paragraph second sentence of the NMC, which stipulates that the burden of proof when damage arises in connection with a collision is reversed.

In relation to the personal injury of passengers on board of the faulty vessel, Chapter 15 of the NMC applies. NMC § 428 determines who is entitled to bring a claim against the owner. The claimant must prove the extent of damage and also that the injury arose as a result of the collision during the carriage. Another scenario where the passengers may suffer loss is when the vessel is stranded in ice and the voyage is delayed. The claimant must then show that a delay has been incurred and that he thereby suffered loss. In this case too, in order to avoid liability, the shipowner must prove that the loss was not caused by his personal fault or neglect or of those for whom he is responsible, cf. NMC § 421 fourth paragraph and § 418 second sentence.

Injured seamen, as well as employees injured in Norway in connection with the operation of the ship, are covered by the compensation provisions contained in the National Insurance Act. As mentioned earlier, ordinary tort principles are applied to de-

termine whether the tortfeasor is liable, cf. Tort Act Chapter 3, but in this particular case the damages available in tort must be considered in the light of social security regulations.<sup>61</sup> Thus, the injured seamen during the course of his employment is entitled to certain benefits cf. the National Insurance Act of 28 February 1997 § 13-3. However, when he chooses to sue the shipowner, a deduction will be made from damages corresponding to sums paid under the National Insurance Act.

The above being said, it can be concluded that when a third party has suffered losses in connection with the operation of the ship, he may claim damages. The liability for such damage is usually on the shipowner's account even when there is no contractual relationship between the parties. Furthermore, in certain situations the shipowner's liability for damage is strict. This means that liability may arise without the presence of any culpable conduct. Such situations, as discussed above, are the rules in the statutory provisions regarding the damage or loss resulting from pollution caused by oil which has escaped or been released from the ship. Another example of this type of strict liability can occur when the reversed burden of proof may be effectively insurmountable, making the shipowner liable even in the absence of negligence.

Thus, if the shipowner cannot prove that a collision with another vessel in icy conditions or the event of stranding in ice is not a consequence of his fault or negligence, he will be held liable for damages to third parties who have consequently suffered a loss.

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<sup>61</sup> Falkanger (2011) p. 172

## **7. Claims against the hull insurer for physical damage to the ship**

### **7.1. Legal background and legal basis for the claim**

The ownership and operation of a vessel involves considerable risk. As we have seen earlier, this risk typically consists of damage or loss to the vessel, as well as risk of liability to persons and property in connection with the operation of the ship. It is therefore required that those involved in maritime activities, e.g. the shipowner or the charterer are protected against such risks. In practice, this is possible by effecting insurance cover. The main feature of marine insurance cover for a shipowner is his protection against loss of or damage to the principal asset i.e. the ship and this is typically achieved by effecting Hull & Machinery insurance (H&M).

In Norway, marine insurance has traditionally been effected on the conditions of the Norwegian Marine Insurance Plan (NMIP). Chapter 1 of the NMIP contains introductory provisions in relation to the marine insurance contract. According to NMIP § 1-1 letter (b) the persons entering into the insurance contract are the insurer and the person effecting insurance while the person entitled to claim the insurance compensation is called the assured, cf. NMIP § 1-1 letter (c). The NMIP is not binding on the assured unless it is incorporated in the actual contract<sup>62</sup> and furthermore the insured is entitled to make a claim against the insurer for loss or damage that is covered under the insurance contract.

In the UK, marine insurance is regulated by the Marine insurance Act of 1906. The main set of insurance clauses covering hull insurance for ocean going ships are the “Institute Time Clauses (Hulls)”. Seventy five percent (75%) of the market is insured on ITCH 1983, however, our discussion will only focus on the features characteristic to the Norwegian Marine Insurance market.

Traditionally, Hull and Machinery Insurance covers three different types of losses. These are total loss of the ship, damage to the ship and the owner’s liability for damage to another ship as a result of a collision. Typical incidents due to contact with ice or icebergs are damages to the propeller, rudder, collisions with icebergs or collisions

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<sup>62</sup> Wilhelmssen (2007) p. 31

between vessels in icy waters with hull damage as consequence, freezing damage (pipelines, etc.) or wear of paint.<sup>63</sup> Some of these damages may be small, the cost of repair being under the H&M deductible agreed in the policy, and therefore not covered by the insurers. Total loss compensation is triggered when the ship is lost or if it suffers casualty damage which is not economically feasible to repair. If the ship is damaged, the hull insurance will cover the costs of repair but a certain portion of the repair cost must be paid by the assured (deductible). An example of total loss is the cruise vessel MS Explorer which sank in the Antarctic Ocean in 2007 after has struck with ice.

In addition, H&M insurance can also cover the owner's liability arising from collision or striking by the ship cf. NMIP § 13-1. Usually this type of cover is supplemented by the P&I insurance since the H&M insurance does not cover the shipowner's liability for any pollution or personal injury claims that might arise from the collision. Furthermore, the hull and machinery's insurers liability is limited to the sum insured which in practice is the assessed insurable value of the ship<sup>64</sup>.

Lastly, the hull insurance policy based on NMIP also contains limited loss of hire cover in that the hull insurer will cover a portion of the loss of time incurred by the assured in connection with the repair of the vessel following a casualty.

## **7.2. Legal issues regarding the H&M insurance cover**

When concluding the insurance contract, ordinary background contract law apply. The starting point in Norwegian insurance is that the insurer is liable for a casualty or an insured event that occurs during the insurance period. The main rule according to NMIP § 2-8 is that "insurance against marine perils covers all perils to which the interest may be exposed". This means that marine insurance covers all risks that are not specially excluded. Typical examples of perils covered according to § 2-8 of NIMP are perils of the sea and nature, perils connected to the carriage of goods, injurious acts by third parties or the negligence by the assured. Ice is a peril of the sea which is also covered but with a special deductible of one fourth, cf. NMIP § 12-15.

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<sup>63</sup> Haahjem, Reidun, Insurance for Arctic shipping <http://presenter.qbrick.com/?pguid=b6e52824-ea52-4bad-a4cd-686dd13b2880>

<sup>64</sup> Wilhelmssen (2007) p.478

The general deductible regulated by NMIP § 12-18 is stating that for each casualty the amount stated in the policy shall be deducted. However, the special deductible, cf. NMIP § 12-15 for ice damage is calculated as a percentage (25%) of the gross costs before any other deductibles, cf. NMIP § 12-19. The main purpose of this deductible is the preventive effect. Shipowners which intend to trade their vessels in icy waters should have prior knowledge as regards to navigation but also as regards to the type of vessel used. Generally the transportation in ice covered waters is more difficult and hazardous. In case of accidents the salvage operations are lengthy and expensive, therefore, the insurers would typically require a higher premium for vessels traded in such areas. As regards the deductible, in practice, the insurers usually impose a fixed amount which will depend on the trading areas and on the allocation of risks under the specific charter party.

As a general rule §12-18 of the NMIP stipulates that the deductible is to be calculated for each separate casualty. However, as regards several casualties that occur at short intervals, it is stipulated in § 12-18 second subparagraph that damage caused by navigating in ice during the period between departure from one port and arrival at the next port, shall be treated as on single casualty. Thus only one deductible will apply. This was also illustrated in Rt. 1974.410. In this case T/S Sunvictor drifted aground when she was sailing in St. Lawrence River. The reason of grounding was that the cooling water intake became blocked by ice and the engine had to be stopped. She received help and was towed the next day to a port of refuge and after another day continued the voyage from the port of refuge to Quebec where she was docked. During both the towage and the voyage to Quebec the vessel suffered additional ice damage which, as argued by the insurers, represented a new casualty, subject to a new deductible. The insurance policy incorporated a clause establishing a separate deductible of USD 100,000 and which should be calculated for damage “*arising out of each separate accident*”. Furthermore the clause stipulated that this expression should be understood to mean “*(a) that a sequence of damages arising from the same accident shall be treated as due to that accident*”. The causation between the individual incidents of damage, and the actual circumstances made it natural to consider the damage as “a sequence of damages” thus, the Supreme Court held that there should



only be one deductible.<sup>65</sup>

Coastal states with seasonal or year-round ice-covered oceans and seas, as principle require the shipowner, ship-managers or charterers to ensure their vessels intended to operate in extremely cold climates with proper ice class. The ice class is typically given by various Classification Societies and in Norway according to NMIP § 3-22 this rule constitutes a safety-regulation. Should such rule be breached, the shipowner may not be covered by insurance, cf. NMIP 3-22. These rules or safety regulations are primarily aimed at preventing oil spills or other types of losses. The condition of class may also be required by authorities offering icebreaking services in countries like Finland and Sweden. These rules are implemented when ice is getting thick, the purpose being to limit ships of a certain size and with a minimum ice-class and to stop ships that cannot safely trade in the prevailing ice conditions.<sup>66</sup> The consequence of not complying with the requirements is that in case of a casualty the vessel will not receive assistance except for saving lives in an emergency.

The conditions necessary to invoke the breach of safety regulation by the insurer are that the assured or the shipowner must be responsible for the breach and that there is a close connection between the infringement of the safety regulations and the loss. According to NMIP § 3-25 first paragraph, the sanction for the breach of such regulations is the loss of all insurance cover. However, when the negligence is of nautical nature e.g. the breach is connected to navigational rules, cf. NMIP § 3-25 first paragraph second sentence, the rules regarding the sanctions for breach of safety regulations do not apply.

As mentioned above, H&M insurance can also cover the owner's liability arising from collision or striking cf. NMIP § 13-1. The legal basis for the liability is irrelevant; it may be fault, strict liability or liability pursuant to the agreement, and the liability must not have been established by judgment in order to be covered, cf. NMIP § 4-17. The indispensable condition is only that the loss was caused by the insured ship "through collision". The hull insurer's collision liability will thus cover the damage but

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<sup>65</sup> Falkanger (2011) p. 545

<sup>66</sup> Claes, Lindh (2003)

[http://www.swedishclub.com/upload/Loss\\_Prev\\_Docs/Heavy\\_weather/Avoid%20trading%20in%20ice...\\_TSCL%202-2003.pdf](http://www.swedishclub.com/upload/Loss_Prev_Docs/Heavy_weather/Avoid%20trading%20in%20ice..._TSCL%202-2003.pdf)

it is limited to the sum insured, cf. NMIP § 13-3. The potential liability in excess of the sum insured may be recoverable from the hull- interest insurer and if this is not enough to cover the liability, P&I will come as a supplement to the collision liability under the hull insurance. This will be discussed later on in chapter 9.

As regards the trading limits, the seasonally excluded areas are typically the St Lawrence Seaway, Northwest coast of North America, Northwestern Russia and the Baltic which cannot be navigated during winter season. The Norwegian Marine Insurance Plan § 3-15 regulates three types of trading limits i.e. ordinary, excluded and conditional trading limits and the detailed geographical description is incorporated in The Plan by way of separate Appendix. It must be noted that the starting point for the rules regarding navigation in excluded trading areas, cf. § 3-15 third subparagraph is that the insurance ceases to be in effect. However, there are two important exceptions: firstly, the assured is permitted to sail in excluded areas with the insurer's consent given beforehand and with the condition of payment of an additional premium; secondly, the insurance will continue if the infringement was not the result of an intentional act by the master of the ship.

### **7.3. Concluding remarks**

As we have seen above, the hull insurer is in principle liable to cover damages caused due to striking against ice or caused by collisions with icebergs in open sea. In the latter case, it must be noted that the damage is covered without deductible, cf. NMIP § 12-15.<sup>67</sup> The exception from the insurance cover, in connection with the breach of safety regulations and breach of trading limits, do not raise considerable problems. When safety regulations have been infringed, the shipowner must cover the damage to the extent it is proved that the loss is not a consequence of the breach or that he was not responsible for the breach, cf. NMIP § 3-25 first paragraph. As for the trading limits, the hull underwriters may allow vessels to trade outside the limits corresponding to the NMIP and its Appendix depending on conditions and time of the year. However, as

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<sup>67</sup> Wilhelmssen (2007) p.281

regards the compensation for loss, the shipowner is left without cover for a considerable extent, unless higher premium has been agreed. In practice, when a higher premium is established and paid, this subsequently decreases the amount of deductible if this is ab initio imposed by the insurers in the policy. Otherwise the special deductible of one fourth is applicable, cf. NMIP §12-15, when the insurance was effected on Norwegian terms. The shipowner's right to claim for compensation will in any case depend on the provisions stipulated in the insurance contract. Therefore, it is advisable that the shipowner is aware of the risks involved when trading the vessel in the high north or when the vessel approaches icy waters and make sure to communicate this to his insurers.

## **8. Claims against the loss of hire insurer for delays caused by ice**

### **8.1. Legal basis for the claim and legal issues**

The Hull and Machinery insurance policy based on NMIP also contains limited loss of hire cover in that the hull insurer will cover a portion of the loss of time incurred by the assured in connection with the repair of the vessel following a casualty. However, the relevant provisions of interest for the shipowner who wants to effect loss of hire insurance on the basis of the Plan are found in Chapter 16, in combination with the provisions of Part One.

The term “loss of hire insurance” suggests that cover is granted for incidents which cause the vessel to be demobilised and be deprived of income.<sup>68</sup> This does not mean, however, that the insurance will cover all situations when the ship fails to produce income. A precondition for the cover is that the ship incurred damage which would have been recoverable under a hull insurance effected pursuant to the conditions of the Plan, cf. §16-1 first paragraph.

Therefore it can be said that the loss of hire insurance will not cover incidents when the ship is delayed due to strike or ice or other similar situations, cf. chapter 16 of the Plan<sup>69</sup> i.e. delay caused by ice preventing the vessel from leaving the port is not covered. However, there are some exceptions, cf. 16-1 second paragraph.

Although initially this type of insurance was primarily effected for ships on time charter in order to protect the shipowner against loss of income if the ship went off-hire, today, loss of hire insurance is effected by any ships that are employed under other type of contracts of affreightment.

As a general principle NMIP § 16-1 stipulates that there is no recovery under the loss of hire insurance, unless the vessel has suffered damage recoverable under the Plan. Thus, a vessel that suffered damages to the hull after a collision with an iceberg or because it was trapped in ice, will recover the loss of time needed for repairing these damages, cf. NMIP § 16-1. However, loss of hire insurance is extended so as to include

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<sup>68</sup> Stang-Lund (2008) p.23

<sup>69</sup> Falkanger (2011) p. 554

loss of income resulting from e.g. grounding which does not necessarily result in damage to the vessel, see NMIP § 16-1 subparagraph 2. A vessel can be prevented from moving due to an agglomeration of ice and thereafter becomes stranded. The cause of stranding is immaterial as long as it is due to a peril covered under the policy and the exclusions from Chapter 3 do not apply.<sup>70</sup>

As mentioned above, the loss of hire insurer does not cover delay caused by ice preventing the vessel from leaving the port and this is also the situation when the vessel is prevented from entering the port because of ice hindrance. Thus, if a vessel must choose another port where it can arrive safely, the loss of freight or extra costs of discharging or loading the cargo at that port are not covered under the loss of hire insurance. This does not mean that the shipowner remains uncovered. A typical situation may be the charterer's breach regarding the ice clause provisions and his failure to nominate a safe port. In such situation, the shipowner could still find remedy by claiming compensation from the charterer.

As opposite to the hull insurance, the deductible applicable to loss of hire insurance is calculated for a period counted in days and it is usually agreed in the policy, cf. NMIP § 16-7. The most common in the practical use is the 14, 30 or 60 days deductible but the parties may agree any deductible period with the consideration of the premium for each individual case. The loss of earnings during the deductible is not recoverable from the insurer, cf. NMIP § 16-7 (1). However, the shipowner may claim compensation from a tortfeasor pursuant to tort law or contract, e.g. when two vessels collide while manoeuvring in icy waters and one of the vessels is at fault, the innocent vessel may recover such losses.

The rules regarding the deductible for several casualties during one voyage, apply in the same way as in the H&M insurance provisions, i.e. all ice damage occurring during the voyage between the departure and arrival ports, shall be deemed as one casualty, cf. NMIP § 16-7 (2).

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<sup>70</sup> Stang-Lund (2008) p.50

## **8.2. Concluding remarks**

When the shipowner effects loss of hire insurance he is in principle protected against loss of time for repair of damages or delays caused when the vessel is prevented from trading, and is compensated by the insurer according to the rules in Chapter 16. There are also given situations when the loss of hirer does not offer cover for the shipowner's loss of time. However, compensation can still be claimed by the shipowner against a possible tortfeasor or a faulty contractual party. The same applies when due to the deduction period the shipowner remains uncovered.

## **9. Claims against the P&I insurer for damages to third parties**

### **9.1. Legal basis for the claim**

As we have seen in chapter 6 the shipowner is in principle liable for third party claims arising from damages caused in direct connection with the running of the ship. Such liability is covered under the P&I insurance.

Protection and Indemnity Insurance (P&I) is first and foremost a liability insurance and in this thesis we will use Gard's Rules (GR) as point of reference. In order to qualify for cover, according to Gard Rules (GR) 2.1 and 2.2, the liability must be expressly mentioned in the conditions and terms. This means that P&I insurance do not have the character of general liability insurance. The liability must be a legal liability, an ex gratia payment by the assured with no legal basis will, therefore, not be covered by the insurance.<sup>71</sup> It is irrelevant however whether the liability arose from a contractual relationship or a non-contractual one, what forms the basis of liability (negligence, strict liability) or under which country's law it has arisen.

An important condition according to the GR Rule 2.4.a. is that the liability in issue for which cover is claimed must have arisen in direct connection with the running of the ship for which the insurance applies.

"P&I insurance" was developed in response to the need by the shipowners for insurance cover for third party liabilities that were not recoverable under the standard Hull and Machinery policies.<sup>72</sup> Thus, in principal, P&I insurance is a liability insurance protecting the shipowner against liability with respect to personal injury and death, and the one fourth collision liability not covered by hull insurance and excess collision liability i.e. the liability in excess of the sum insured in the hull policy. Furthermore, the standard modern P&I insurance also covers loss, damage and expenses incurred by the assured such as liabilities arising from the carriage of cargo, pollution liability, liability for damage to fixed or floating objects.

Nowadays climate change is a reality and an often debated matter among the leading maritime countries. The tendency of an increased ice melt in the Arctic leaves

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<sup>71</sup> Falkanger (2011) p. 556

<sup>72</sup> Gold (2002) p. 81

greater open sea areas and subsequently opens the possibilities for shipping industry, bunkering and oil exploration.

For shipping companies, ice-free Arctic summers would open up for new and shorter routes between Europe and Asia while for oil companies new opportunities are offered by the Arctic's substantial oil and gas reserves. However, such great economic activity may have significant impact on the people living in this region as well as on the arctic environment. The reason is the greater risk of accidents, oil spills and unexpected emissions.<sup>73</sup> The International Maritime Organisation (IMO) has provided guidelines for ships operating in Arctic ice-covered waters to ensure maritime safety and pollution prevention. However, the challenge of cleaning up oil spill under ice, if such event should happen, is great and it is argued<sup>74</sup> that there is no technology today which could recover oil from ice and that the traditional methods of cleaning up spills would be ineffective at capturing oil trapped under the ice. A contra argument in this respect<sup>75</sup> states that in fact ice can act as a natural blockade that traps the oil and gives responders more time to clean up.

The shipowner's liability under GR Rule 38 in the case of oil spill, liability for the actual losses incurred by third parties, as well as expenses in connection with measures to prevent or limit such liability will be covered.

In case of collision between two vessels in icy waters we have seen that P&I insurance will answer for the shipowner's liability for collision and striking, cf. GR Rules 36 and 37, as long as such liability is not already covered under the ship's H&M insurance. However, in connection with a collision the hull insurer excludes from cover certain types of liability, e.g. personal injury. Therefore the P&I insurer will cover both the excess liability and the types of liability not covered by the hull insurer.

The rules concerning cover for the shipowner's liability for claims related to persons are found in GR Rules 27-33. In this respect the P&I insurer will cover the legal liability of the shipowner which arises as a result of: passengers incurring injuries or

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<sup>73</sup> High North High Stakes (2009) p. 88

<sup>74</sup> BarentsObserver.com, No way to clean up oil spill under ice: Canadian expert  
<http://www.barentsobserver.com/no-way-to-clean-up-oil-spill-under-ice-canadian-expert.4793639-16334.html>

<sup>75</sup> Ibis



death cf. RG Rules 27, 28, 29, persons who have no association with the ship, but are nonetheless affected by an incident arising in direct connection with the operation of the ship, e.g. the crew or passengers of another ship, victims of a collision, cf. GR Rules 30. Such liability may arise under statutory law, tort law or it may arise by virtue of contract. However, in the latter case, the cover would be available only to the extent the contractual provisions have previously been approved by the P&I insurer.<sup>76</sup> There are also important limitations to the passenger liability cover, in that liability for delay will be covered only if this flows from mandatory law. In the same context, the P&I insurer is only liable to the same extent to which the shipowner would be under the transportation contract, had he exercised his right to limit his liability according to the relevant legislation.

As it concerns the shipowner's liability connected to cargo, in principle, the basis of the shipowner's liability may flow from either mandatory or discretionary law, or by virtue of an agreement. The shipowner will thus have a claim against the P&I insurer for the cover of liability in relation to the cargo owner where goods have been lost completely or have become damaged, cf. GR Rule 31.1.a. Cover is also entitled for the shipowner's liability for losses owing to goods becoming delayed, provided that such liability follows from mandatory legislation, see GR Rules 34.2.

## **9.2. Concluding remarks**

No particular problems are raised in the relationship between the shipowner and his P&I insurer for liability to third parties. As we have seen, the main condition for the shipowner's claim against the P&I insurer is the existence of a legal liability. It is irrelevant where this liability is deriving from, (whether it is a contractual liability or a non-contractual liability), what forms the basis of the liability (liability by negligence or strict liability) or under which country law it has arisen. However, as far as contract law is concerned, the P&I insurer is only liable to the extent he previously agreed with the terms of the contract or when a particular clause of the contract has been approved

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<sup>76</sup> Williams (2008) p.185

by the insurer beforehand, cf. GR Rule 55.a. In other words, when the shipowner has undertaken a contractual liability which is more far reaching than would have otherwise flowed generally from the law, the P&I insurer remains free from liability.

## **10. The charterer's insurance cover under the Charterer's liability insurance**

Charterers, whether voyage or time charterers need, cover for their exposure against liability towards the party they charter the ship from typically the shipowner or another charterer. Usually, this type of liability relates to vessel damage caused by, for instance, cargo-handling or unsafe port or berth as discussed in subchapter 3.1.2. In addition, one condition of a charter party is in principle that the charterer must return the ship to the owner “...*in like good order and condition, fair wear and tear excepted*” (NYPE 93 form clause 10, Baltime clause 7). Finally, even when a charter party contractually imposes the liability on the shipowner, some jurisdictions allow a claimant to pursue compensation from a party he finds most suitable. It is therefore important that the charterer is covered for such exposure. This is achieved by effecting the so called Charterer's Liability Insurance (CL) which is typically offered by P&I Clubs. The charterer's liability for loss of or damage to the vessel will be then covered by the Damage to Hull insurers while the liability for loss or damage to cargo, loss of life or third party liability claims will be covered by an extended cover namely, the Charterer's P&I insurance.

For the purpose of this thesis, the discussion will be limited to a presentation of the charterer's right for cover of damage to the hull as a result of nominating an unsafe port and the cover of liability for cargo damage. Hence, this subchapter will not discuss all the features typical to the charterer's liability insurance.

It must be noted that the typical aspects of the H&M insurance terms as outlined in the previous subchapter do not apply to a time or a voyage charterer. This is because the shipowner has the main responsibility for the operation of the ship or the ship itself which is also the scope of the shipowner's H&M insurance. It is unlikely that a charterer would undertake such amount of responsibility through a contract. However, this does not disappear entirely. We have seen in subchapter 3.1.2. that the charterer may be found liable for damages incurred because of ordering a vessel to an unsafe port or berth. Thus, if the port is unsafe – in our case because of ice obstruction – the charterer may have a liability to the shipowner, should damage to the ship occur. This

is a risk that a time or voyage charter is exposed to in connection with the hull and machinery of the chartered ship. Therefore, he will be able to claim the protection he has under his H&M insurer. In the example above, if the vessel is directed by the charterer into a port where even with icebreaker's assistance the vessel gets damaged on the bottom because of heavy ice, the Charterer's hull insurers will respond to shipowner's claim for consequential dry-docking and repair costs. Such an insurance is usually considerable less expensive than the shipowner's H&M insurance for the same ship.<sup>77</sup> In addition, when it is agreed prior in the charter party and based on a special clause, the charterer's hull insurance would also cover damages caused by entering excluded trading areas against payment of extra insurance premium by the charterer.<sup>78</sup>

In chapter 5 we have discussed the position of the shipowner and his liability towards claims brought by a cargo owner who suffered damages in connection with a vessel transporting the cargo in ice covered waters. It was also mentioned that a cargo owner may claim for damages against the charterer based either on the underlying sale of goods, the bill of lading or in tort. A typical situation may be when the charterer is shipping cargo belonging to a third party (customer) or has sold the cargo prior to the shipment. In such circumstances he would generally have a liability for the cargo as a third party property. It is possible in this case that the cargo owner has arranged "all risk" cargo insurance. Nevertheless, the charterer would still incur a subrogated claim under the terms of the charter party. In this circumstance the charterer's P&I insurance would cover the liability for loss of or damage to cargo incurred under the contract of carriage, i.e. primarily the charter party or the charterer's bill of lading.

From the discussion in the previous chapters it can be seen that the charterer is exposed to a wide range of legal and contractual liabilities, especially when the vessel is traded in areas or ports difficult to navigate because of ice hindrances. A prudent charterer would therefore make sure to effect insurance to cover his exposure to such risks. And when he does so, his liability for damage to hull, for loss of or damage to cargo and for additional costs incurred as such, will all be covered by his insurers.

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<sup>77</sup> Gohlish (2008) p. 48

<sup>78</sup> See subchapter 7.2.

## 11. Conclusion

Norwegian law is based on the principle of freedom of contract, subject only to limited restrictions. The parties of a charter party i.e. the shipowner and the charterer can therefore freely decide the nature of their relationship and the particular provisions which will govern the contract according to their specific need. Ice clauses are provisions which the parties will agree upon when they decide to trade their vessel in waters covered by ice or when the ports of loading or discharging may be considered dangerous by reason of ice. The purpose of the ice clauses is generally to give the shipowner additional rights in situations involving ice and permit the master not to proceed when the port is icebound or when there is a risk that the vessel cannot safely enter or leave the port on account of ice. However, the ice clause alone does not answer all the legal problems that arise between the parties in dispute. There is no clear allocation of risk in connection with the ice damage to the vessel's hull. In this respect, the solution is given by the safe port clause, when the parties have agreed upon such provisions. According to English law the safe port provision is the main clause in relation with damages caused by ice and usually this is an express warranty given by the charterer with the result that when the vessel is damaged due to nomination of an unsafe port the shipowner has a claim against him for damages to the ship. This is also the result in the *Helen Miller* case<sup>79</sup> where the time charterer was held liable for ice damages. In Norway, the shipowner will have a claim against the charterer for damages to the ship based on the same provision regarding safe ports but his liability is triggered only when it can be proved that he acted negligently.

Such damage to the vessel's hull will in principle be covered by the shipowner's H&M insurance according to the Norwegian Marine Insurance Plan but hull insurance may also be effected by the charterer. For damages caused by ice, a special deductible is applied cf. NMIP § 12-15 which has a preventive affect and it must be therefore covered by the shipowner. However, when the charterer's liability for such ice damage is established, the shipowner may claim from the charterer compensation based either

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<sup>79</sup> See subchapter 3.1.3.

on a mutual agreement prior to concluding the charter party or based on the tort law principle that anyone acting in culpable manner so as to cause losses to another party is liable for the damage. Whether the charterer will be able to claim cover for such liability from his insurers, depends mostly on the insurance conditions agreed prior with his CL Hull insurers.

With the opening of the Northern Sea Route for commercial purposes, companies which want to explore the opportunities given will also have to consider the challenges involved. These may be connected to the effects of extreme cold and the risk of damages to the vessel, as well as the possible oil spills and the consequences to the environment. Due to the thinning of the polar ice cap, the NSR is now considered effectively open to shipping<sup>80</sup> but trading in icy conditions means however that shipowners have to assure their vessels with proper superior ice class. Furthermore, even though, at this time, official reports state that “almost the entire NSR was open to icebreaker-free shipping”<sup>81</sup> the ice conditions remain relatively harsh even in the summer season, thus icebreakers assistance is still required.

The parties involved in the operation of the vessel must be aware of these risks and eventually be prepared for the worst case scenario. Specific provisions in a charter party which deal with the ice situation i.e. the ice clauses, are not sufficient to allocate clearly the risk between the parties. Even though the general ice clause may be modified by the contractual parties in accordance with their specific need, this may be both a lengthy and expensive process. Therefore it would be of future interest to revise the general ice clauses so as to answer the challenges of a new Arctic commercial transportation.

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<sup>80</sup> Corkhill (2011) [https://www.bimco.org/Home/News/2011/09/14\\_Feature\\_Week\\_37.aspx](https://www.bimco.org/Home/News/2011/09/14_Feature_Week_37.aspx)

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### **List of Abbreviations**

BIMCO	Baltic International Maritime Conference
CL	Charterer's Liability insurance
H&M	Hull and Machinery insurance
NMC	Norwegian Maritime Code
NMIP	Norwegian Marine Insurance Plan
NSR	Northern Sea Route
P&I	Protection & Indemnity